Supreme Court, U.S.
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No. 02-1646

In The
Supreme Court of the United States

THE HIGBEE COMPANY, d/b/a DILLARD DEPARTMENT STORES, INC.,

Petitioner,

v.

LYNETTE CHAPMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

In its petition for a writ of certiorari, Dillard's explained (Pet. 12-20) that the decision below involves a direct conflict among the courts of appeals as to whether the "full and equal benefit" clause of 42 U.S.C. Section 1981(a) applies to private entities that are not acting under color of state law. This conflict concerns the uniform interpretation of the Nation's oldest civil rights statute, a recurring issue of unquestioned importance. The importance of this issue is underscored by the fact that an increasing number of claims are being made under the "full and equal benefit" clause and the courts have not yet provided concrete guidance on its meaning.

Chapman concedes in her Brief in Opposition ("Opp.") that "the scope of the post-amendment version of Section 1981 is an important issue of federal law." (Opp. 7.) However, Chapman argues that the Court should not address this "important issue of federal law" because: 1) the disagreement among five courts of appeals as to the scope of the "full and equal benefit" clause does not "present a true conflict" (Opp. 3); 2) this important issue of federal law is "not a 'recurring issue'" (Opp. 8); 3) the Court's decision below "does not misread the legislative history and does not lead to internal inconsistencies in the statute" (Opp. 8); and 4) the Court's ruling on Chapman's claim under a different statute somehow prevents review here (Opp. 9). None of these arguments is persuasive, and none changes the central fact that the Third, Fourth, and Eighth Circuits have held that the "full and equal benefit" clause does not apply to private actors, and the Second and Sixth Circuits have held that it does. It is this fact that warrants the Court's attention.

A. The Division Among the Courts Of Appeals As To Whether Claims Under The "Full and Equal Benefit" Clause Of Section 1981 Requires State Action Represents A True Conflict.

Chapman devotes most of her brief (Opp. 3-7) to arguing that the division among the courts of appeals over the scope of the "full and equal benefit" clause of Section 1981 does not "present a true conflict among the courts of appeals." Chapman's argument was rebutted by the Second Circuit in *Phillip v. University of Rochester*, 316 F.3d 291, 296 (2d Cir. 2003), where the court noted the growing conflict over the interpretation of the "full and equal benefit" clause among the courts of appeals, stating "we respectfully differ with the contrary conclusion reached by the Eighth and Third Circuits." The Sixth Circuit also recognized, in the en banc decision below, that "[t]wo sister Circuits, in *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3d Cir. 2001), and *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), disagree with us. . . ." 319 F.3d at 833, n.6. Pet. App. 13, n.6.

Chapman's disagreement with the Second Circuit and the Sixth Circuit concerning the existence of a conflict among the courts of appeals is based not on any reconciliation of conflicting opinions, but on Chapman's belief that cases disagreeing with her interpretation of the "full and equal benefit" clause are wrongly decided (Opp. 3-7).

Regardless of Chapman's view, the conflict among the courts of appeals over the interpretation of the "full and equal benefit" clause can only be resolved by this Court, and not by her gloss on the opinions analyzing that clause with which she disagrees.

Chapman argues that the Third Circuit in *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977) and *Brown v. Philip Morris, Inc.*, 250 F.3d 789 (3rd Cir. 2001), the Fourth Circuit in *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd in part on other grounds*, 481 U.S. 615 (1987), and the Eighth Circuit in *Youngblood v. Hy-Vee Stores, Inc.*, 266 F.3d 851 (8th Cir. 2001), and *Adams v. Boy Scouts of America-Chickasaw Council*, 271 F.3d 769 (8th Cir. 2001) were wrong in concluding that the "full and equal benefit" clause of Section 1981 does not apply to private actors because these cases were decided before the 1991 amendment to Section 1981 or cite cases decided before the amendment.[1]

Once again, Chapman's argument does *not* show that there is no conflict among the courts of appeals or that any of these courts no longer require state action for a claim under the "full and equal benefit" clause. Indeed, the Third Circuit reiterated its view that state action was required in 2001 and the Eighth Circuit adopted that view the same year.[2] Instead, Chapman's argument merely illustrates why she disagrees with these decisions.

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[1] Chapman's *entire* argument against the decisions of the Third, Fourth, and Eighth Circuits is that they predate or do not sufficiently consider the effect of the 1991 amendment to Section 1981. But Chapman's argument goes too far. Neither the case law preceding that amendment nor the earlier legislative history of Section 1981 support her interpretation of the "full and equal benefit" clause. It is unlikely that Congress intended to transform this legal landscape by amending Section 1981 in 1991, particularly when the legislative history for that amendment is devoid of any mention of the "full and equal benefit" clause.

[2] In *Adams*, the Eighth Circuit declared: "[W]e recognize that this Court had not, until just recently, squarely adopted *Mahone*'s holding –

(Continued on following page)

Chapman's argument that the court of appeals decisions with which she disagrees failed to consider the effect of the 1991 amendment of Section 1981 is also incorrect. In both *Adams* and *Youngblood*, the Eighth Circuit cited the panel decision in *Chapman* in concluding that "because the state is the sole source of the law, it is only the state that can deny the full and equal benefit of the law." *Adams*, 271 F.3d at 777; *Youngblood*, 266 F.3d at 855. It is true, as Chapman points out, that the panel decision below was vacated and has no precedential effect in the Sixth Circuit. But it is also true, as the Second Circuit observed in *Phillip*, that "*Chapman* contains a lengthy analysis of the state action issue." 316 F.3d at 296. Indeed, the Second Circuit discussed the panel decision in *Chapman* at length "because the *Chapman* majority arguments coincide with defendants' arguments and were adopted by reference in *Youngblood*" 316 F.3d at 296.

Chapman also attempts to minimize the conflict among the courts of appeals over the "full and equal benefit" clause by claiming that there has been "an extremely limited number of Circuit decisions so far" (Opp. 7). In fact, this issue has been addressed by five of the twelve territorial courts of appeals, and has been the subject of an en banc decision in the Sixth Circuit and two opinions in the Eighth Circuit. This Court recently granted a petition for a writ of certiorari to resolve a conflict involving four courts of appeals. *Jones v. R.R. Donnelly & Sons Co.*, U.S. No. 02-1205, *cert. granted*, May

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although we had on several occasions cited *Mahone* with approval. . . . However, this Court has now directly addressed the issue." 271 F.3d at 777 (Citations Omitted).

19, 2003.[3] Thus, it is clear that, contrary to Chapman's arguments, there is a real and substantial conflict among the courts of appeals over the "full and equal benefit" clause.

B. The Proper Scope Of The "Full And Equal Benefit" Clause Of Section 1981 Presents An Important And Recurring Issue Of Federal Law.

Chapman also contends that, even though "the scope of the post-amendment version of Section 1981 is an important issue of federal law," it is not a "recurring issue of federal law" and thus does not merit review by the Court (Opp. 7-8). Chapman bases this argument on the fact that only five courts of appeals have considered the issue (Opp. 7-8).

Dillard's does not agree that an issue is not a "recurring issue of federal law" because it has been addressed by five of the territorial courts of appeals. As noted above, the Court has just recently granted certiorari to resolve a conflict involving four of the courts of appeals. Moreover, the Second, Third, Sixth, and Eighth Circuits have *all* addressed this issue in the last two years. And an increasing number of claims covering such disparate areas as the marketing of cigarettes, the supervision of children at

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[3] *Jones* involves the question of the proper statute of limitations for new causes of action created by the 1991 amendment to Section 1981. *Jones* demonstrates a continuing interest of the Court in interpreting issues raised by the 1991 amendment to Section 1981. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 1 (2003) (Court addresses impact of 1991 Civil Rights Act on mixed motive discrimination cases).

camp, the questioning of students at a university, and prison altercations are being brought under the "full and equal benefit" clause. (Pet. 18-19). The proper interpretation of the "full and equal benefit" clause of Section 1981 is an issue of recurring and growing importance.

C. Interpreting The "Full And Equal Benefit" Clause Of Section 1981 As Applying To Private Action Misreads The Legislative History And Leads To Inconsistencies In The Statute.

As Dillard's explained in detail in its petition for certiorari, applying the "full and equal benefit" clause to private action both misreads the legislative history and leads to internal inconsistencies in the statute. (Pet. 20-26). Chapman attempts to counter this by citing to a statement from a House Report on the 1991 amendment of Section 1981 that makes *no* mention of the "full and equal benefit" clause (Opp. 8). The statement quoted by Chapman indicates that subsection (c) was added to Section 1981 "to strengthen *existing* protections and remedies available under federal civil rights laws and to provide more effective deterrence and adequate compensation for victims of discrimination." H.R. Rep. No. 102-40 (II) at 1, *reprinted in* 1991 U.S.C.C.A.N. at 964. (Emphasis added).

This statement does not support Chapman's argument. Claims against private actors under the "full and equal benefit" clause were not part of the "existing protections and remedies available under federal civil rights law" in 1991. Prior to the 1991 amendment, all courts of appeals to have considered the issue, and almost all district courts to have considered the issue, had concluded

that the "full and equal benefit" clause did not apply to private actors.[4]

D. The Sixth Circuit's Decision On Chapman's Section 1983 Claim Has No Bearing On This Matter.

Chapman's final argument opposing Dillard's petition is Chapman's claim that because the Sixth Circuit found that there was a question of material fact as to whether Dillard's acted under color of state law, the District Court's grant of summary judgment to Dillard's would still have been in error even if "the Sixth Circuit had found . . . that state action is required for a claim under Section 1981's 'full and equal benefit' clause" (Opp. 9). What Chapman neglects to mention is that the Sixth Circuit found that there was a genuine issue of material fact as to whether Dillard's acted under "color of state law" with respect to Chapman's putative claim under 42 U.S.C. Section 1983 and *not* with respect to her Section 1981 claim. 319 F.3d at 834, 843. Pet. App. 17-18, 34.

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[4] Indeed, most court decisions and legal writings analyzing Section 1981 have focused on the "make and enforce contracts" clause of the statute and on the outer limits of that provision. Chapman's position is that the amendment of Section 1981 in 1991, which expressly addressed the "make and enforce contracts" clause, in effect rendered it redundant because similar relief is now available under the "full and equal benefit" clause without any need for a contractual showing. Yet, the legislative history contains no mention of the "full and equal benefit" clause and, as Chapman notes, Congress was interested in strengthening "existing protections and remedies."

The majority in *Chapman never* considered whether Dillard's was engaged in state action for purposes of the "full and equal benefit" clause of Section 1981, and Judge Suhrhunrich's dissenting opinion, while agreeing with the majority's analysis of Chapman's putative Section 1983 claims, expressly noted that "I would hold that Chapman failed to state a cognizable § 1981 claim because the alleged private discrimination she suffered is *not within the purview* of the equal benefit clause" 319 F.3d 843. Pet. App. 34 (Emphasis added). Thus, both the majority (which never discussed the state action issue with respect to Chapman's Section 1981 claim) and the dissent (which indicated that the discrimination alleged by Chapman was outside the scope of the "full and equal benefit" clause) regarded the question of whether the "full and equal benefit" clause applied to private action as outcome determinative with respect to Chapman's Section 1981 claim. The Court should grant this petition to answer the question of whether the "full and equal benefit" clause requires state action and to create a uniform standard as to the meaning of that clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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